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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted pursuant to Commission resolution 1997/27

Addendum

Report on the mission of the Special Rapporteur to the Republic of Poland

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Introduction

1. This report has been prepared pursuant to resolution 1997/27 of the Commission on Human Rights. It presents and analyses information received by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, during his visit to Poland from 24 to 28 May 1997, as well as information received from individuals and non-governmental organizations concerning matters relating to the right to freedom of opinion and expression.

2. The Special Rapporteur would like to express his gratitude for the cooperation extended to him by the Government of the Republic of Poland in discharging his mandate. He highly appreciates the assistance received from the Government in the organization of his visit. He would like to convey his gratitude especially to the Minister for Foreign Affairs and his staff who helped make this visit successful.

3. The Special Rapporteur would also like to express his appreciation to the Resident Representative and staff of the United Nations Development Programme in Warsaw for their efficient organization of his visit.

4. During his visit, the Special Rapporteur met with representatives of the Government, the judiciary, a former prime minister, as well as the current and a former Ombudsman. He also met with non-governmental organizations that are active in the field of human rights, academics, writers, professionals of the media sector and other members of civil society who were of interest for his mandate.

5. A list of persons with whom the Special Rapporteur met during his visit is contained in the annex to this report. It should be noted that this list is not exhaustive. The Special Rapporteur had the opportunity to meet with many other persons in the course of his visit, and would like to take this opportunity to thank them for their generous efforts to assist him during his visit to Poland.

I. BACKGROUND AND CONTEXT

6. Since the fall of the Communist regime in 1989, Poland has embarked on a large-scale transition, replacing a system of totalitarian government and central economy with a parliamentary democracy and a social market economy. This process has been accompanied by a far-reaching review and revision of the entire legal system, including the adoption of a new Constitution in 1997. Since the dissolution of the Communist system, Poland had maintained a provisional constitutional regime, first through several amendments to the 1952 Constitution and later with the so-called little constitution of 1992. Following three years of negotiations, the Constitutional Commission approved a draft constitution in January 1997, which was passed by the National Assembly on 3 April 1997. After a period of heated discussions, the draft constitution was approved in a national referendum on 25 May 1997.

7. An important element in the transformation of the political order has undoubtedly been the removal of restrictions on the freedom of expression and the media, particularly the lifting of censorship and the abolition of

one-party monopoly over the mass media. Before 1989, the State had a complete monopoly over the media, including almost full ownership and full control over its distribution. Supported by the wide-ranging political, economic and legal reforms, Poland embarked upon a process of privatization of the press empire of the Communist Party and the overall democratization of the mass media. To that end, the Government established a liquidation commission charged with the redistribution of property in the media sector. In the area of broadcasting, the most significant development was the adoption of the Broadcasting Act in December 1992, which introduced a legal framework for regulating the broadcasting landscape, prompted by the emergence of numerous private radio and television stations, initially operating in a legal vacuum. In present-day Poland, the media market is flourishing with a large number of national as well as foreign newspapers and magazines as well as private television and radio services.

II. PRINCIPAL CONSIDERATIONS AND CONCERNS

A. Legal framework

International obligations

8. Poland accepted a wide range of international obligations in the field of human rights. It is party to the International Covenant on Civil and Political Rights (1977), including its first Optional Protocol, which came into force in 1992. Furthermore, Poland ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1992, which came into force on 19 January 1993. It has further accepted the right of individual petition, as of 1 May 1993, as well as the jurisdiction of the European Court of Human Rights in all matters concerning interpretation and application of the Convention.

9. In its capacity as participating State of the Organization for Security and Cooperation in Europe (OSCE, previously Conference on Security and Cooperation in Europe - CSCE), Poland accepted many additional international commitments. These include the 1975 Helsinki Final Act, the 1990 Charter of Paris for a New Europe, the 1990 Copenhagen Document, and the 1994 Budapest Document.

National legislation

10. As noted above, a new Constitution was approved in a national referendum on 25 May 1997. The new constitution grants citizens the right to freely express their opinions and to acquire and disseminate information. It prohibits preventive censorship of the means of social communication and the licensing of the press. Laws can require a permit for the operation of a radio or television station (article 54). Article 14 guarantees freedom of the press and other means of social communication. Article 61 specifies the right to information, stipulating that a citizen has the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. It further specifies that the right to obtain information provides access to documents and entry to sittings of collegial organs of public authority formed by universal elections. Limitations on the

rights to information can be imposed by law solely to protect freedoms and rights of other persons and economic subjects, public order, security, or important economic interests of the State.

11. Provisions concerning the National Council of Radio Broadcasting and Television, the broadcasting regulatory agency, are contained in articles 213 to 215, which specify the Council's role in safeguarding the freedom of speech, the right to information, as well as the public interest regarding radio broadcasting and public television; they also provide for its members to be appointed by the Sejm, the Senate and the President of the Republic and that they are not to belong to a political party, a trade union, or perform public activities incompatible with the dignity of their function.

12. Finally, provisions concerning the Commissioner for Citizen's Rights are contained in articles 208 to 212 which specify, inter alia, his or her role in safeguarding the freedom and rights of persons and citizens as enumerated in the Constitution and other normative acts. It is furthermore stipulated that the Commissioner is appointed by the Sejm, with the consent of the Senate, for a period of five years. The Commissioner is independent in his activities, independent of other State organs, and accountable only to the Sejm. Moreover, it is specified that the Commissioner annually informs the Sejm and the Senate about his activities and reports on the degree of respect accorded to the freedoms and rights of persons and citizens.

13. An important aspect from the citizen's point of view, is the introduction in the Constitution of a provision by which anyone whose rights, as specified in the Constitution, have been infringed has the right to appeal to the Constitutional Court (article 79).

14. A number of provisions of the Penal Code of 1969 have direct relevance to the protection of freedom of opinion and expression. While the Special Rapporteur notes that a new Penal Code is in the process of being adopted, he nevertheless wishes to address a number of provisions in the Penal Code of 1969 relating to freedom of expression, which found application in the more recent history of Poland. The relevant provisions of the national legislation will be dealt with throughout the text under the relevant subheadings. The same method is applied for other relevant national legislation, notably the Press Act of 1984, the State Secrecy Act of 1982, the Radio Broadcasting and Television Act (hereinafter "Broadcasting Act") of December 1992 (with later amendments) and the Civil Code, specifically with regard to the amendment to article 448 adopted in 1996.

B. Information received by the Special Rapporteur

Insulting government institutions or officials

15. Article 270 (1) of the Penal Code stipulates that "Whoever publicly insults, scoffs at or degrades the Polish Nation, the Polish People's Republic, its system or supreme organs shall be subject to the penalty of deprivation of liberty from 6 months to 5 years." This law has been applied in the more recent history of Poland in a number of cases, one of which concerns presidential candidate Mr. Leszek Bubel, who, in October 1995, was allegedly charged with violating this article, as well as article 273, which

provides for between 1 and 10 years' imprisonment for committing crimes specified in articles 270-272 using the press and other media of mass communication. Mr. Bubel had reportedly claimed on a radio programme that a former head of the presidential chancellery protected a group of criminals. Another, earlier case relates to the prosecution of a drunken night watchman who, in 1992 had been overheard insulting the then-President Walesa, and who had been sentenced to pay a fine equivalent to a month's salary and a one-year suspended sentence. The Government informed the Special Rapporteur that indeed article 270 (1) was a legacy of communism, abused for political purposes, and may come into conflict with freedom of expression. Therefore, an amendment to this law was called for as early as 1989 in order to provide for the conditions that allow for political criticism.

16. Furthermore, the Special Rapporteur was informed by the Government of a case concerning conviction of an individual for insulting public officials which was the subject of an individual complaint at the European Commission of Human Rights, 1/ on the grounds that the conviction was in breach of his right to freedom of expression; the Commission has declared the complaint admissible.

17. The complaint relates to an incident on 2 September 1992, when the applicant observed municipal guards in the process of ordering fruit and vegetable sellers to leave a place unauthorized for selling such products and move to a nearby marketplace, as well as imposing fines on them. The applicant intervened, emphasizing that the actions had no legal basis and infringed on the economic freedom guaranteed by the Economic Freedom Act, and stressed that the guards were acting only upon an oral authorization of the town mayor. The applicant called them "ignorant" and "criminals, who breach applicable laws", urging the sellers to stay.

18. On 5 January 1993 the Zdunska Wola Public Prosecutor handed down an indictment against the applicant to the Zdunska Wola District Court. The applicant was charged with having verbally abused municipal guards during and in connection with carrying out their official duties and of acting with flagrant contempt for the legal order, i.e. an offence specified in article 236 of the Penal Code read together with article 59, paragraph 1 of the Code. Article 236 provides that, "Whoever insults a public functionary or a person called upon to assist him, in the course of and in connection with the performance of official duties, shall be subject to the penalty of deprivation of liberty for up to 2 years, limitation of liberty or a fine." On 29 April 1993, the applicant was convicted of verbal abuse of two municipal guards within the meaning of article 236 of the Penal Code read in conjunction with article 59, paragraph 1. The court considered the offence to be of a "hooligan character" within the meaning of article 59, paragraph 1, and sentenced him to eight months' imprisonment (suspended) and a fine of 1.9 million zlotys. He was also ordered to pay the court costs.

19. The applicant appealed against this decision, arguing that the conviction was based on insufficient evidence as it had not been established that defamatory words had been used, but rather that the court had found only that the applicant had called the guards ignorant, which he believed could not be regarded as insult, but rather as an acceptable criticism of public servants. Further, his offence could not be regarded as being of hooligan

character. On 29 September 1993, the Court of Appeal held that indeed the actions could not be considered to have be of hooligan character, as the genuine motive of the applicant had been to defend the sellers. Concerning the lack of sufficient evidence, while admitting that the actual abusive words were not mentioned in the grounds of the judgement, the delict of abuse of the guards could be established from the case file. The abuse consisted of calling the guards "dumb" and "oafish" (cwoki and glupki), words commonly considered as offensive. Thus, the applicant had overstepped the limits of freedom of expression and had correctly been found to be in breach of the relevant provision of the Penal Code. It was pointed out that the purpose of the article was not to protect the personal dignity of civil servants, but rather to ensure that they were not hindered in carrying out their tasks.

20. The applicant claims a violation of his right to freedom of opinion and expression as his acts were only acceptable criticism of public servants. He furthermore submits that the acts of the municipal guards were unlawful and that he was right in criticizing them.

21. The Government holds that the interference with the right to freedom of opinion and expression was prescribed by law under article 236 of the Penal Code, that the measure complained of pursued the legitimate aim of "the protection of the reputation or rights of others", namely the municipal guards, and that the interference was necessary in a democratic society, relying on a wide margin of appreciation of the domestic authorities in assessing the necessity of interference with the freedom of expression. The Government contends that the authorities acted rationally and in good faith. While holding that criticism of public authorities cannot in principle be penalized, but rather should be approved of in a democratic society, certain standards must be observed when voicing such criticism and the authorities must react, in particular when legal regulations as to public order are flagrantly breached. In the view of the Government, the applicant's behaviour did not comply with applicable standards as it breached moral principles universally considered to be binding in Poland, as well as violating penal law; this part of the application should therefore be declared manifestly ill-founded.

22. On 27 November 1996, the European Commission on Human Rights declared admissible, without prejudging the merits, the applicant's complaint that his conviction was in breach of his right to freedom of expression. The Special Rapporteur notes that during its December 1997 session, the Commission adopted a report under article 31 regarding this case.

23. The Special Rapporteur was informed by the Minister of Justice as well as other sources that the protection of personal reputation and honour lacks sufficient legal protection at the present time in Poland. The increase in the level of violence against public persons was noted as well as the fact that the judiciary is cautious in taking up such cases.

Defamation

24. Offences against honour and personal inviolability are stipulated in chapter XXIV (articles 178-182) of the Penal Code, as well as in the Civil Code.

25. The Special Rapporteur was informed of an amendment to the Civil Code passed in August 1996 establishing that a person whose personal interests had been violated in any way could be granted financial compensation (article 448). At the same time, the provision in the Press Act establishing that in order for financial compensation to apply it must be proven that the journalist consciously violated someone's personal interest, was repealed. The Special Rapporteur was informed that prior to the amendment, a journalist could establish a defence if he or she could prove having paid the greatest possible attention to detail in compiling the information.

26. This amendment is feared to have a chilling effect on press freedom, as journalists are held responsible not only for deliberate, but also for unintentional infringements on personal interests, and it seems that neither the good faith of the journalist nor public interest remains an admissible defence. It is thus feared that the provision will result in journalists trying to avoid difficult subjects and may discourage investigative reporting.

State secrets

27. The Penal Code provides that, "Whoever discloses information constituting a State secret, shall be subject to the penalty of deprivation of liberty for from 6 months to 5 years" (article 260). On 6 February 1996 the Provincial Court of Warsaw sentenced Jerzy Urban, editor-in-chief of the weekly NIE (No) to a one-year suspended prison sentence and a fine of 10,000 zlotys for publishing State secrets. He was furthermore banned from publishing articles and from serving as the editor-in-chief of the newspaper for one year. He had been found guilty of "disclosing information constituting a State secret" under article 260 of the Penal Code. The accusation relates to the publication of documents in June 1992 relating to cooperation between the secret police and a political opposition activist, information which is secret under the State and Official Secrets Act of 1982. Urban was considered by the court to have purposely violated the Act since he had held a government position in the 1980s and thus would necessarily have had knowledge of this law. The Court of Appeal in September 1996 reversed the sentence, returning the case to the State Prosecutor for further investigation, ostensibly for procedural reasons. The case was reportedly discontinued.

28. The Special Rapporteur was informed that the law of 1982 on the protection of State and official secrets is another remnant of the past and warrants attention as regards its limitation of freedom of expression. State secrets are reportedly broadly defined as any piece of information which, if revealed to unauthorized persons, may jeopardize the defence, security, or some other important State interest. This relates in particular to defence, law enforcement and security agencies, research in the area of national defence or security, industries of key importance for the national economy, banking, and preparations for and negotiation of international agreements. According to the information provided to the Special Rapporteur, lists specifying the types of information constituting State secrets are drawn up by government departments, provincial governments and the President of the National Bank of Poland. The Ministers of Internal Affairs, Defence and Foreign Affairs are to be consulted in matters affecting their respective area of competence. The law provides that the obligation to keep State secrets is

binding on everyone who comes into possession of such information, including journalists. The latter may be refused information by civil servants or public officials claiming that it is a State secret, reportedly without recourse to court. 2/

Protection of sources

29. Another issue that has received some attention is the protection of sources. The Special Rapporteur was informed that a number of court rulings had suggested a conflict between the Press Act, which provides for the right of journalists to protect secrecy (article 15), and article 163 of the Code of Penal Procedure, which specifies that persons under the obligation to keep an official secret or a secret connected to their profession may refuse to testify on circumstances covered by the obligation, unless the court or a prosecutor has released them from the obligation to keep that secret.

30. This issue has been the subject of extensive discussions and examination in Poland, particularly following a ruling by the Supreme Court in January 1995 that the provisions of the Penal Code overruled those of the Press Act, and that journalists may therefore not refuse to divulge a source if they have been released from that obligation by a court or the prosecutor.

31. The Special Rapporteur was informed during his visit of a divergence of views regarding this ruling. The Minister of Justice informed the Special Rapporteur that some important amendments to the Code of Penal Procedure initiated by him had been accepted, according to which journalists would have the right to protect their sources except in cases of homicide, terrorist acts, genocide, and acts resulting in large-scale catastrophes. Nevertheless, the Special Rapporteur was informed that the ruling of the Supreme Court remains in force.

Access to information

32. The Special Rapporteur received information regarding difficulties encountered by journalists in obtaining access to information, particularly on questions related to the State and on activities of public institutions. This was reported to be the case specifically as regards local government officials who are said to be reluctant to divulge documents, allegedly in the absence of clear guidelines.

Broadcasting

33. The role of television in the transition process is to be regarded somewhat differently from the privatization process and the freedom of the print media, given a number of additional constraints of a technical as well as economic nature. After the initial stages of the democratic opening, the broadcasting sector found itself confronted with a spontaneous transformation of the broadcasting landscape with a number of private broadcasters starting operations without the existence of a proper regulatory framework. 3/ This prompted the adoption, in December 1992, of the Broadcasting Act to establish the independence of public broadcasting and regulate the market. To that end, the law envisages the establishment of a supervisory body, the National Broadcasting Council (NBC), consisting of nine members appointed by the Sejm,

the Senate and the President of Poland, for a period of six years. Every two years, one third of the Council is replaced. In an attempt to ensure the political independence of this body, the nine members are obliged to renounce membership of a political party and public associations. In 1995, two amendments to the 1992 law were adopted, in order to state explicitly the rights of the organs appointing members of the NBC and to specify the conditions under which members may be recalled. Both houses of parliament and the President can recall any of the members they have designated in cases of illness prohibiting the fulfilment of duties, criminal conviction, or violation of the Broadcasting Act as pronounced by the Tribunal of State. 4/ A member may also resign. A proposal for further, more comprehensive amendments to the Broadcasting Act, which reportedly took into account proposals by lawyers, representatives of Polish Television as well as commercial broadcasters and NBC personnel, is being elaborated. 5/

34. The main aims of the NBC are to protect the freedom of speech and independence of broadcasters, the interests of the public, and the open and pluralistic character of radio and television. It is furthermore charged with the granting of television and radio broadcasting licences and the appointment of members of the supervisory boards and programme councils in public radio and television. The NBC has authority to order the suspension of programmes violating the law, to fine broadcasters who breach the law or refuse to carry out decisions made by the Chairman under a resolution of the National Council, and to grant frequencies, in cooperation with the Minister of Communication. Decisions by the Chairman of the NBC regarding violations of the regulations, rights, or provisions of the licence granted can be appealed to the Regional Court in Warsaw. 6/

35. The Broadcasting Act defines the tasks of public radio and television. These include the encouragement of artistic, literary, scientific and educational activity as well as the production of programmes for Polish communities abroad. It further specifies that the programme services of public radio and television should be guided by a sense of responsibility and the need to protect the good name and reputation of public broadcasting; provide reliable information about the diverse developments and processes taking place in Poland and abroad; promote the free formation of citizens' views and of public opinion; enable citizens and their organizations to take part in public life by expressing diversified views and orientations to exercising their right to supervision and social criticism; serve the development of culture, science and education, with special emphasis on Polish intellectual and artistic achievement; respect the Christian system of values, adopting as its basis the universal principles of ethics; serve the strengthening of the family; promote health protection; serve the combating of social pathologies; take into account the needs of national and ethnic minorities (article 21). 7/

36. In the area of television, the broadcasting domain is dominated by one national public broadcaster, founded in 1952 and transformed into a joint-stock company in 1994. It comprises 2 national and 11 regional channels and 1 satellite channel. It remains the most powerful news medium, despite a growing competitive private sector. Its operations are financed from licence fees, advertising and sale of services and licences. It is guided by a public service broadcasting mandate. The supervisory board, consisting of nine

members, eight appointed by the NBC and one by the State Treasury, appoints for a period of four years a five-member board of directors, responsible for the management of television and supervising its planning strategy. Public service broadcasters are owned by the State Treasury which, however, has no legal right to interference in programming matters and is not entitled to any dividend or any part of whatever profit the companies may have at the end of the year. 8/

37. Several concerns have been expressed with regard to the area of public television broadcasting. The Special Rapporteur notes the controversies that have arisen with regard to allegations of political interference in public television, despite the established aim of the NBC to provide independent and professional supervision. A majority of persons met during his visit attributed these allegations to the failure to select members of the NBC on the basis of expertise. In particular, despite the attempt to guarantee the independence of the members of the NBC, the appointment process is widely believed to be influenced by political considerations. In this connection, recommendations have been made for specific steps to be taken so as to ensure the independence of the NBC, for instance through an amendment to the law.

38. According to the information received by the Special Rapporteur, concern about political influence in public television was voiced after the resignation of the head of Polish television in 1996. His successor had allegedly made a number of controversial statements, questioning whether public television should be expressing independent opinions. Furthermore, it was reported that a number of staff changes had taken place, allegedly for political reasons, and reference was made to allegations of political bias in television coverage.

39. The Special Rapporteur was furthermore informed that it had been decided in mid-1996 by the Board of Directors that outside producers would no longer be able to produce current affairs programmes, ostensibly for technical reasons. While the Special Rapporteur was informed that this decision is in practice contravened, the fact that the decision has not been formally repealed nevertheless has created some concern.

40. As regards private television, the first nationwide private broadcaster, Polsat, licensed in 1994, has been joined by a second channel. Two new regional channels were scheduled to begin broadcasting in the autumn of 1997. The Special Rapporteur was also informed of the proliferation of foreign broadcasts into Poland and the development of satellite and cable networks. In his meetings with various media professionals, the hope was expressed that the increased competitiveness would decrease the political influence in television.

41. In the area of radio broadcasting, the National Broadcasting Council has licensed three non-State nationwide networks, including two private and one religious channel. The Special Rapporteur was informed that currently, 17 regional public service broadcasting channels were operating, as well as a great number of private local radio stations and Church-owned radio networks. The market share between public and private radio was described as a balanced 50 per cent each.

42. Political influence, reported to constitute a major problem as regards public television, was not considered problematic in public radio. This was mainly attributed to an underestimation of the power of influence of radio broadcasting on the political views of the population.

Respect for Christian values and religious feelings

43. The Special Rapporteur was informed of the highly controversial debate at the end of 1992 prompted by a provision in the Broadcast Act concerning Christian values. Article 18, paragraph 2, of the law states that all programmes must respect the religious feelings of the audience, and particularly the Christian system of values. In addition, it is stipulated, in article 21, paragraph 2, point 6, that the programme services of public radio and television should respect the Christian system of values, adopting as their basis the universal principle of ethics.

44. These provisions were hotly disputed prior to the adoption of the law and were challenged before the Constitutional Court of Poland by a group of members of parliament, alleging that the provisions would be incompatible with the Constitution due to the violation of the principle of equality, as well as establish preventive censorship. By decision of 7 June 1994, the Constitutional Court confirmed the constitutionality of the provisions, holding that they create only a duty of respect for values which are of universal, not only religious character. 9/ Nevertheless, as the National Broadcasting Council has the ultimate responsibility for supervising programme content, these restrictions were feared to have the potential for being used as a means of censorship if enforced, although such fears reportedly have so far proved to be unfounded.

45. In this context, the Special Rapporteur notes that the Penal Code also includes a provision relating to offending religious sentiment, punishable by a fine or a two-year prison term (article 198). In several instances, films or publication of material with a religious connotation allegedly resulted in calls for banning or censorship from certain Roman Catholic groups who would want to see certain kinds of expression limited. One such example is the wave of complaints allegedly provoked in August 1994 by the weekly Wprost which featured on the cover a black Madonna and Child wearing gas masks to protect themselves from environmental pollution.

46. Furthermore, the Special Rapporteur received information regarding the case of a Catholic priest, Henryk Jankowski. In January 1997, the Gdansk prosecutor pressed charges against Fr. Jankowski for publicly defaming the Jewish minority in a sermon in June 1995, in which he compared the Star of David with the hammer and sickle and the swastika. The procedure was reinstated at the request of the Prosecutor-General after no elements of a crime had initially been found and the investigation dropped for lack of evidence in June 1996. The procedure was eventually discontinued in March 1997, but Fr. Jankowski was nevertheless obliged to make a financial contribution to a public cause.

The protection of public morals

47. The issue of public morals has taken on increased importance, in the light of an increase in the influx of the so-called yellow press as well as films from Western countries. The Special Rapporteur was informed of an increasing concern in Poland regarding the depiction of violence in the media and its possible influence on the young.

48. A related phenomenon is the issue of pornography, which has equally assumed some importance since the democratic opening in Poland and other countries in the region. The increased public concern in Poland is said to be the result of the influx of pornographic material from abroad and its circulation under market conditions. It is also said, however, that pornographic films are increasingly being produced in Poland and exported to Western Europe. It is foreseen that producers of hard-core pornography will be strictly prosecuted.

49. Article 173 of the Penal Code provides that, "whoever disseminates writings, printed matter, photographs or other objects having a pornographic character, shall be subject to the penalty of deprivation of freedom for up to 2 years, limitation of liberty or a fine".

50. According to information received from the Minister of Justice, while pornography is penalized, in practice, prosecution is rudimentary, as pornography remains an undefined term and in order to draw the line between permitted and prohibited acts, courts are obliged to consult experts. The Special Rapporteur learned furthermore that in the provision in the new Penal Code governing pornography, the burden of proof was shifted from the content of the image to the form of its presentation. In practice, this means that responsibility arises when material is presented or distributed in such a way that persons unwilling to be exposed to pornographic images cannot avoid exposure, for example in the case of pornographic magazines in kiosks.

Economic obstacles

51. The Special Rapporteur noted that a predominant concern was the difficulties arising from the transition from a State monopoly over the media to a system governed by a free market, and the prevailing economic constraints, which were referred to in nearly all his meetings. One major difficulty of the liberalization of the media market is reported to be a need for the development of diverse media and the pre-eminent role played by foreign capital in the media industry.

52. Furthermore, the freedom of expression of journalists was said to be compromised at times by the interference of owners in editorials. For instance, the Special Rapporteur was informed that the press was extremely limited in its attempts to reveal wrongdoings on the part of public officials, particularly at the local level, as the owners of certain publications feared the negative impact of such coverage on their future business relations. The function of the press to inform on issues of public interest may thus be restricted by private interests. In this regard, demands had been made for a policy limiting the owner's ability to interfere in editorial matters.

53. The Special Rapporteur was also informed that the national press distribution system presents an additional obstacle to the press, although this problem is expected to be solved with the ongoing process of privatization.

Registration

54. The Special Rapporteur received information from the Government concerning an individual application against Poland under article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. 10/ The case concerns the refusal by the court to register the titles of the periodicals "Germany - A Thousand Year-old Enemy of Poland" and "The Social and Political Monthly - A European Tribunal", thus preventing the applicant from publishing the said periodicals.

55. On 9 September 1993, the applicant's request for registration of a title of a periodical, "The Social and Political Monthly - A European Moral Tribunal", to be published in Kety, was dismissed by the Bielsko-Biala Regional Court. In accordance with the Press Act and the Order of the Minister of Justice on the Registration of Periodicals, the title of a periodical should be relevant to the contents. This was not considered to be the case in this instance; it was held that the title would suggest the establishment of a European institution in Kety, which was untrue and would be misleading to prospective buyers. The decision was upheld by the Katowice Court of Appeal on 17 December 1993.

56. On 17 February 1994, the applicant's request to the Bielsko-Biala Regional Court for registration of a press title of a monthly "Germany - A Thousand Year-old Enemy of Poland" was dismissed after the applicant refused to alter the negative character of the title as requested by the court. The court considered that the registration of the periodical with the proposed title would be harmful to Polish-German reconciliation and detrimental to good cross-border relations. The Katowice Court of Appeal upheld the decision on 12 April 1994.

57. According to article 20 of the Press Act, registration of the title by the Regional Court is required as a prerequisite for publication of a periodical. The request for registration should contain the proposed title, the address of the editor, the name and other personal data of the editor-in-chief, the name and address of the publishing house and the frequency of publication. Decisions must be taken within a period of 30 days. Registration shall be refused in case of incomplete data or if the proposed title would prejudice a right to protection of the title of any existing periodical. In accordance with article 23 (a) of the Press Act, the Minister of Justice is authorized to issue an order to specify the manner in which the registration process is to be run. Article 5 of the said order of the Minister of Justice stipulates that registration may be refused if the registration would not be in conformity with the regulations in force or with the current state of affairs. Publishing without being registered is subject to a fine (article 45).

58. The applicant complains that, in violation of article 10 of the European Convention, Polish courts refused to register the titles of two periodicals which he wanted to publish.

59. The Government submits that the refusal of registration falls within the bounds of permissible restrictions under article 10 (2) of the European Convention. In both cases, the courts had considered that the proposed titles would not correspond to reality for the reasons explained above. The Government holds that both decisions were in conformity with Polish law and did not infringe the applicant's freedom of expression as guaranteed by article 10 of the Convention, and that the application should thus be declared manifestly ill-founded.

60. The applicant holds that with regard to the journal "The Social and Political Monthly - A European Moral Tribunal", it is obvious that the only meaning to be given to the title is that a periodical under that name is published there. Furthermore, the Government did not show how the journal entitled "Germany - A Thousand Year-old Enemy of Poland" would be detrimental to Polish-German relations, but had assumed that the journal would emphasize only the negative aspects of those relations. The refusals were thus not prescribed by law and amounted to prior censorship. At present the parties are trying to achieve a friendly settlement of the case.

61. The Special Rapporteur was informed by a government representative that a request had been forwarded to the Minster of Justice by the Ministry of Foreign Affairs for the subparagraph requiring that the facts in the registration be in conformity with the current state of affairs be removed; after nine months, following inter-ministerial consultations, the Press Act was amended and the disputed requirement for registration removed.

Commissioner for Civil Rights Protection

62. Poland has undertaken a variety of measures to ameliorate the protection of human rights. This includes the establishment, on 15 July 1987, of the institution of the Commissioner for Civil Rights Protection, with the first Commissioner taking office on 1 January 1988. This is considered to be an important step in the protection of human rights. Modelled after the Scandinavian ombudsman example, it was the last in a series of State bodies established by the Communist regime to protect civil rights; the others included the introduction of the High Administrative Court in 1980, the State Tribunal in 1982, and the Constitutional Tribunal in 1985. The Special Rapporteur was told that it was the view of some that the establishment of such citizen-oriented bodies was aimed at giving credibility to the policy of liberalization vis-à-vis the international community and the domestic public.

63. In accordance with the Act of 15 July 1987 on the Commissioner for Civil Rights Protection, the Commissioner's role includes investigating breaches of the law and/or principles of community life and social justice due to any action or omission on the part of agencies, organizations or institutions responsible for compliance with and implementation of such rights and liberties (article 1). The Commissioner can act on the motion of citizens or their organizations, local governments, as well as at his or her own initiative (article 9), and is empowered to undertake a broad range of

actions. Most importantly, the office has been put to effective use by the first Commissioner who is acknowledged to have significantly shaped its important role.

64. The institution was described as being very powerful and not comparable with other institutions established in the region. In the view of the first Commissioner, the basic function served by an ombudsman in countries in transition is that of educating the public and the establishment, including in the rule of law with regard to the public and the administration. With regard to the courts of justice and the Constitutional Court, the first Commissioner considers promoting the concept of the "constitutionalization" of thinking about law and generalizing the use by courts of international law to be important aims. Moreover, cooperation with the press is seen as extremely important. 11/ Finally, the success of the institution has been attributed mainly to the timing of its creation as well as its operational strategy, i.e. political and ideological neutrality and the promotion of the rule of law and human rights. 12/

III. CONCLUDING OBSERVATIONS

65. The Special Rapporteur welcomes the developments he was able to observe during his visit to Poland, both with regard to the reform of the political and economic system as well as the legal and institutional framework for the protection of human rights. The rapid transition in Poland from a one-party system to a multi-party democracy is indeed very encouraging for the cause of human rights and democracy throughout the world. Freedom of opinion and expression, a highly cherished value during the struggle for freedom, clearly finds the protection it warrants and any attempt at restriction is closely scrutinized by all sectors of society. Rightfully, many countries have been watching Poland's experiences with great interest and hoping to learn from them. The long struggle for freedom of expression in the country is undoubtedly one of its unique features.

66. Certainly, any transformation is a step-by-step process which must include a review and revision of legal and institutional regimes governing political and economic life, and of consciousness. Good law alone will indeed lack efficacy in the absence of individual understanding of the spirit of the law. Education of all sectors of society will play an important role in maintaining the process of a successful transition.

67. The Special Rapporteur welcomes the progress made with regard to revising and adopting new legislation to replace legislation from the Communist past. He notes that this process is not yet considered as complete. While in some instances the lack of new legislation has resulted in obstacles to the full enjoyment of the right to freedom of opinion and expression, he believes that overall, the engagement of the Government to ensuring the protection of freedom of expression, at times in spite of significant pressures from certain sectors of public opinion, is testimony to its genuine commitment to the protection of this right. Indeed, he observes that in a number of cases, the State defended the right to freedom of opinion and expression against other trends in society.

68. Undoubtedly, freedom of opinion and expression is widely apparent in Poland. Censorship was abolished some years ago, and while some laws may be interpreted to infringe on the right to freedom of opinion and expression, the majority of them are widely seen as relics of the past and in practice, complete freedom of opinion and expression is exercised. The media have been operating in a free and independent environment after the State monopoly was eliminated. Indeed, the existence of newspapers such as NIE affirms that the right to freedom of expression is protected, in defiance of attempts by diverse societal actors to restrict this freedom on the grounds of "morality".

69. The Special Rapporteur found the most prevalent concerns during his visit to be the perceived negative impact of liberalization and free market forces on freedom of expression, and the internationalization of the media. In this context, the Special Rapporteur wishes to emphasize his view that private financial interests and media monopolies may indeed pose obstacles to the full enjoyment of the right to freedom of opinion and expression and should therefore be guarded against. Thus, in matters related to ownership, a balance must be struck between the duty of the State to refrain from regulation and undue intervention and its duty to carry out a policy conducive to the freedom of expression and information. In particular, he wishes to emphasize his belief in the need for genuine editorial independence vis-à-vis political power and pressure exerted by private interest groups or public authorities.

70. The Special Rapporteur furthermore noted various concerns relating to journalistic freedom, and by implication the public at large and their right to information. He expresses his concern with regard to the alleged restrictions on journalists' freedom of access to information. He notes that in order for journalists to carry out their role as a watchdog in a democratic society, access to information held by public authorities, granted on an equitable and impartial basis, is indispensable. In this connection, the protection of sources assumes primary importance for journalists, as a lack of this guarantee may create obstacles to journalists' right to seek and receive information, as sources will no longer disclose information on matters of public interest. Any compulsion to reveal sources should therefore be limited to exceptional circumstances where a vital public or individual interest is at stake. The Special Rapporteur welcomes the initiatives taken recently with regard to resolving in favour of freedom of information the conflicts in the law affecting the right of journalists to protect their sources.

71. The Special Rapporteur welcomes the efforts undertaken in the area of public broadcasting, particularly with regard to pursuing a policy of public service broadcasting. However, he is concerned about allegations of political influence in television, which is attributed largely to a lack of independence of the National Broadcasting Council. Indeed, in view of the impact and considerable power of influence of radio and television, complete independence from political and private interests is of paramount importance.

72. In addition, the Special Rapporteur remains concerned about the provision regarding Christian values in broadcasting. The role of the mass media in a democratic society should be one of nurturing tolerance and diversity rather than deciding on matters of Christian values. Human rights indeed depend not only on the behaviour of State organs as such but also on

the general atmosphere of tolerance and political and religious pluralism. The educational role of public broadcasting in this endeavour is of the utmost importance and should not be subjected to restrictions based on vague provisions which may be interpreted very broadly and may not be necessary in a democratic society, and which may lead to self-censorship.

73. In this context, the Special Rapporteur observes the concern with the increased level of violence on television and such matters as pornography, which have led to calls for restrictions. While not trying to minimize or deny the potential negative effect of television violence or pornography on society, he would like to emphasize his view that media should not be viewed as an easy scapegoat for social ills. Each restriction in this area must be examined on a case-by-case basis, and the Special Rapporteur welcomes the view expressed by most of his interlocutors that this problem must be addressed at the level of education rather than censorship in broadcasting.

74. The tendency toward restrictions is clearly a common sociological phenomenon during times of social and economic change. Polish society, similar to other societies in East-Central Europe, has experienced a tremendous transformation, which is not limited to structural adjustments but rather placed heavy demands on the population to alter their attitudes and behaviour within a very short period of time. Such periods of large-scale and rapid change create in many cases a demand for security. Under these circumstances, some liberties, in particular freedoms relating to communication, are often no longer perceived as opening possibilities but rather as dangers to the social fabric. Images or expressions not reflecting mainstream society are perceived as threatening. They are particularly vulnerable to exploitation by certain groups which exaggerate the risks they may pose for society, thereby creating a readiness on the part of the population to exchange liberties for security. In such situations, the danger arises that the individualization of modern society will be blamed for all ills that restrictions on liberties will be called for, leaving the root causes of societal upheaval unaddressed.

75. The Special Rapporteur observes that the issue of insult and defamation has received increasing attention. The absence of a proper legislative framework to guide journalists and protect individuals from undue attacks on their honour and dignity appears to have raised some concern. In this connection, the Special Rapporteur recalls that article 19 (3) of the International Covenant on Civil and Political Rights, when read in conjunction with article 17, obligates States to provide legal protection against any intentional infringement on the honour and reputation of individuals by means of untrue assertions. However, in all cases, the principles of proportionality must be strictly observed in order to safeguard against any infringements on the right to freedom of expression.

76. In this connection, and in light of the amendments to the law regarding defamation, the Special Rapporteur considers it necessary to recall that the role of the press as a public watchdog and the right of the public to receive information are essential elements of democracy. These functions and rights should not be compromised by the fear on the part of members of the press of negative consequences resulting from their statements made in good faith and in the interest of the public.

77. The Special Rapporteur expresses his concern with regard to certain provisions concerning insult to government institutions and officials in the Penal Code. In this context, the Special Rapporteur wishes to recall that freedom of expression, in particular freedom of political and public debate, is at the very core of the concept of a democratic society. Government officials and political leaders should be open and responsive to all criticism, and tolerate higher limits of acceptable criticism than private individuals. Restrictions on the right to freedom of expression should not be construed so as to provide special protection against insult or criticism to government institutions, their members, or the head of State. In this regard, he wishes to express his hope that due consideration will be given to international standards in this area when new legislation is considered.

78. The Special Rapporteur observed a great desire on the part of everyone to seek a balance between freedom and responsibility in journalism. He finds the efforts of journalists to develop a code of ethics and to adjust rules of professional conduct to their new role in a democratic society very encouraging.

79. Finally, the Special Rapporteur considers that the experience of Poland in taking on the substantial responsibility of transforming its political and economic system and adapting its legal framework to international standards of democracy and human rights could be of extreme value in assisting other countries in the region in their own transition process; cooperation with other countries in the region may therefore be extremely useful.

IV. RECOMMENDATIONS

80. On the basis of the principal observations and concerns set out in the previous section, the Special Rapporteur would like to offer the following recommendations. In view of the open and constructive exchanges of views that took place during his visit, the Special Rapporteur is convinced that these recommendations will be received in a spirit of shared commitment to strengthening the promotion and protection of the right to freedom of opinion and expression, on which the Government has already embarked in an exemplary fashion.

81. The Special Rapporteur urges the Government of Poland to take all necessary steps to ensure the independence of the National Broadcasting Council (NBC). Steps towards the achievement of this goal should include measures which would ensure that appointments to the NBC are made in such a way as to guarantee its independence, with its members refraining from any interest, financial or political, that could impair their ability to discharge their duties in a fair and impartial manner. It should be considered whether it is advisable to prohibit members of the NBC on completion of their six-years term of office from accepting a remunerated office in government. Members should see themselves as independent trustees of the public interest in broadcasting, not as representatives of any special interests. Appointment procedures could include public hearings and be organized according to criteria providing for diversity and selection depending on professional expertise. Safeguards against any interference by political or financial interests should be included. The Special Rapporteur expresses his hope that

the proposed amendments to the Broadcasting Act will take into account the allegations concerning political influence in television and lack of independence on the part of the NBC.

82. In the context of revising current legislation and adopting new rules, care should be taken not to overemphasize the protection needed for public persons and institutions. Due attention should be given to the importance for a democratic society of allowing free political debate and, accordingly, to the fact that public figures must expect to tolerate a greater degree of criticism than private individuals. In particular, laws or other provisions providing special protection against insult or criticism of government institutions, their members, officials, or the head of State should be avoided. The Special Rapporteur would welcome being kept informed of further developments with regard to the adoption of new legislation in this area which affects the regime governing the right to freedom of opinion and expression.

83. Initiatives on the part of media professionals to establish independent and voluntary professional associations should be encouraged, in particular with regard to developing methods and systems of voluntary self-regulation such as ethical codes of conduct for the profession, training programmes which should address the rights and responsibilities of the media and the Government, as well as monitoring implementation of the right to freedom of expression and freedom of the media in accordance with international standards.

84. The Special Rapporteur wishes to express his view that it should not be possibe for owners to interfere in editorial content subject to strict limitations.

85. Furthermore, the constitutional right to obtain information on the activities of organs of public authority as well as persons discharging public functions should be translated into practice.

86. Finally, the Special Rapporteur recommends that journalists not be compelled to reveal their sources except in the most limited and clearly defined circumstances.

Notes

1/ Application No. 25716/94 by Jozef Michal Janowski against Poland.

2/ This information is based on: Karol Jakubovicz, Freedom of Speech in Poland: An Evolving Concept, pp. 10-11.

3/ In this context, it should be mentioned that at the launching of the first licence-granting process in June 1993, 55 illegal radio broadcasters and 19 illegal TV broadcasters were operating in Poland. The current market results from this first licensing process. See: National Broadcasting Council of Poland. Information Brochure. Warsaw, 1996, p. 14.

4/ Ibid., p. 4.

5/ Bulletin of the National Broadcasting Council of Poland, No. 1/1997, p. 3.

6/ Periodic report of Poland to the Human Rights Committee, CCPR/C/95/Add.8, para. 21.

7/ Bulletin of the National Broadcasting Council of Poland, No. 1/1997, p. 5.

8/ Ibid.

9/ See: Periodic report of Poland to the Committee on the Elimination of Racial Discrimination, CERD/C/299/Add.10, para. 64.

10/ Application No. 26229/95 by Jozef Gaweda against Poland.

11/ Ewa Letowska and Janusz Letowski, Poland - Towards the Rule of Law, Institute of Legal Studies, Polish Academy of Sciences, Warsaw, 1996, pp. 154-155.

12/ Ibid., p. 175.

Annex

Persons with whom the Special Rapporteur met

Government

Mr. Leszek Kubicki, Minister of Justice and Prosecutor-General

Mr. Krzysztof Drzewicki, Delegate to the European Commission on Human Rights and the European Court of Human Rights

Mr. Tadeusz Mazowiecki, former Prime Minister and member of the Sejm

Commissioner for Civil Rights Protection

Mr. Adam Zielinski

Media

Mr. Boleslaw Sulik, Chairman, National Broadcasting Council

Mr. Karol Jakubowicz, Chairman, Supervisory Board, Polish Television

Mr. Ryszard Miazek, President, Polish Television

Mr. Stanislaw Jedrzejewski, Vice-President, Polish Radio

Mr. Jerzy Urban, Editor-in-chief, NIE

Mr. Piotr Stasinski, Deputy Chief, Department of Politics, Gazeta Wyborca

Mr. Tomasz Wolek, Editor-in-chief, Zycie

Mr. Andrzej Jonas, Editor-in-chief, The Warsaw Voice

Mr. Jan Dworak, President, Association of Independent Film and Television Producers

Ms. Anna Smolka, Chamber of Press Editors

Academics

Prof. Ewa Letowska, former Commissioner for Civil Rights Protection; Helsinki Foundation for Human Rights; Institute of Legal Studies, Polish Academy of Sciences

Prof. Miroslaw Wyrzykowski, Deputy Dean, Faculty of Law and Administration, Warsaw University

Catholic Church

Fr. Andrzej Koprowski

Non-governmental organizations

Mr. Andrzej Goszczynski, Director, Press Freedom Monitoring Centre

Mr. Marek Nowicki, President, Helsinki Foundation for Human Rights

Mr. Andrzej Rzeplinski, Member, Executive Committee, Helsinki Foundation for Human Rights

Mr. Jacek Bochenski, President, Polish Pen Centre

Intergovernmental organizations

Mr. Gilles Breton, Deputy Director, Office for Democratic Institutions and Human Rights, OSCE

Ms. Pauline Merino, Information Management Adviser, Office for Democratic Institutions and Human Rights, OSCE